UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

BRICK FACED CONCRETE WALLS, INC.

Employer/Petitioner

and **CASES 7-RM-1482**
7-RM-1483

LOCAL 1076, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA

Local 1076

and

LOCAL 334, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA[1]

Local 334

and

MICHIGAN LABORERS' DISTRICT COUNCIL

District Council

APPEARANCES:

Robert E. Day**,** Attorney, of Detroit, Michigan, for the Employer/Petitioner
George H. Kruszewski, Attorney, of Detroit, Michigan, for Local 1076 and Michigan Laborers' District Council
Bruce A. Miller, Attorney, of Detroit, Michigan, for Local 334

[1] The names of Local 1076 and Local 334 appear as amended at hearing. The petitions in Cases 7-RM-1482 and 7-RM-1483 name only Local 1076 and Local 334, respectively, as recognized or certified agents, although the Michigan Laborers' District Council (District Council) was also a party and signatory to the 8(f) collective bargaining agreement. The District Council was served a copy of the Notice of Hearing and was represented at the hearing by counsel, who also represented Local 1076. Therefore, I find that the District Council was afforded due process and notice of these proceeding and is a proper party to the proceedings.

DECISION AND DIRECTION OF ELECTION

Upon petitions filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,[2] the undersigned finds:

1. The hearing officer's rulings are free from prejudicial error and are hereby affirmed.

2. The Employer/Petitioner (Employer) is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organizations involved claim to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

Overview

The Employer is engaged in the building and construction industry primarily as a residential contractor that pours concrete foundations and erects brick textured screening walls between commercial and residential properties. Since at least 1986, the Employer had been a member of Poured Concrete Wall Association, Inc. (the Association). The Association, in turn, is party to a Section 8(f) relationship with Locals 1076 and 334, and the District Council. A collective bargaining agreement between the Association and the Unions was in effect from August 1, 2003 through July 31, 2006.[3] On about May 1, 2006, the Employer notified the Unions that, as of July 31, it was withdrawing from the Association and revoking its power of attorney. On July 21, the Employer filed the instant petitions. By its petitions, the Employer seeks an election to determine whether the Unions should continue to represent its laborer employees.

[2] The Employer/Petitioner and the Unions filed briefs, which were carefully considered.
[3] The Employer and Unions stipulated that they were parties to the 8(f) agreement.

The Unions contend that the petitions should be dismissed for several reasons. The Unions argue that 1) they have never made a claim of majority status; Local 1076 and the District Council argue that 2) the expired 8(f) contract cannot serve as a basis for the RM petitions, and 3) the bargaining unit described in the instant petitions is different than the contractually recognized bargaining unit; Local 334 contends 4) the current bargaining unit is inappropriate for an election because it is a "one-man" unit.

For the reasons set forth below, I reject the Unions' contentions. I find that a claim of majority status is not required, the Section 8(f) contract serves as a sufficient basis for processing the instant petitions, the variance between the petitioned-for unit and contractual unit does not warrent dismissal of the petitions, and the unit is not a one person unit. I shall direct an election in the bargaining unit set forth in the parties' collective bargaining agreement.

Claims of Majority Status

The Unions contend that the petitions should be dismissed because the Unions have not made a claim of majority status. A claim of majority status is not a prerequisite for the filing of an RM petition. In ***John Deklewa & Sons, Inc.***, 282 NLRB 1375 (1987), enfd. sub nom. ***Iron Workers Local 3 v. NLRB***, 843 F. 2d 770 (3rd Cir. 1988), cert. denied 488 U.S. 889 (1988), the seminal case regarding Section 8(f) agreements in the construction industry, the Board permitted the filing of RM petitions while 8(f) contracts are in effect. In fact, that is one of the four principles set forth in ***Deklewa***: 8(f) agreements will not bar the processing of valid petitions filed pursuant to Section 9(c) and Section 9(e) of the Act. ***Id***. at 1377.

In permitting the filing of an RM petition during the term of an 8(f) contract, the Board does not require an employer to support that petition with the traditional "objective considerations." ***Stockton Roofing Co.,*** 304 NLRB 699, 700 (1991). The Board stated in ***Deklewa*** that "[A]n RM petitioner need only demonstrate that it is signatory to an 8(f) agreement to satisfy the 'objective considerations' requirement." ***John Deklewa***, supra, at 1385 fn. 42. Here, the Employer filed the instant petitions 10 days prior to the expiration of the parties' 8(f) contract. Therefore, the parties' 8(f) agreement satisfies the "objective considerations" requirement and a claim of majority status by the Unions is not required.

The 8(f) Contract Serving as a Basis for the RM Petitions

The insistence by Local 1076 and the District Council that the 8(f) contract has now expired and therefore, cannot serve as a basis for the RM petitions is

misplaced. They cite ***PSM Steel Construction, Inc.***, 309 NLRB 1302 (1992) in support of their position. However, the employer's petition in ***PSM*** was filed after the 8(f) contract had expired. The Employer here filed the RM petitions prior to the expiration of the 8(f) agreement. That is what matters. The subsequent expiration of the agreement is of no significance. See e.g. ***J & R Tile, Inc.***, 291 NLRB 1034 (1988) (election pursuant to the filing of an RM petition was held after the 8(f) agreement had expired). To hold otherwise would encourage delay in the processing of RM petitions filed near the expiration of 8(f) agreements.

Unit Description

The Employer's petitions seek an election in a unit of all full-time and regular part-time field laborers. The Unions cite the parties' expired collective bargaining agreement for the appropriate unit description. The contract reads: "This Agreement shall be applicable within the territorial jurisdiction of the Union and shall cover work, including work in the yards, historically performed by laborers, herein called 'Employees' or 'Laborers' for Contractors in the poured concrete wall industry." The Employer argues that it understood that yard employees have not been included in the bargaining unit for residential or poured concrete wall contractors. The Employer, however, cited no evidence to support its contention. It also did not indicate that it would not want to proceed to an election in the contractual unit. Therefore, I find that the appropriate unit description is contained in the parties' expired collective bargaining agreement.

Local 1076 and the District Council argue that because the bargaining unit described in the instant petitions is different than the contractually recognized bargaining unit, the petitions should be dismissed. They rely on ***PSM Steel Construction, Inc.,*** supra. In ***PSM,*** the Iron Workers union requested that the employer sign a successor 8(f) contract with a unit description consistent with previous contracts, while the Operating Engineers union threatened to picket the Employer for a new, separate 8(f) agreement. The Employer responded by filing an RM petition for a unit consisting of all of its construction employees. The Operating Engineers expressly disclaimed interest in representing employees in the petitioned-for unit. The Regional Director dismissed the petition based on his conclusion that no union had requested to represent a unit of all construction employees and that the unit described in the petition did not track the historical units in either of the expired contracts. Local 1076 and the District Council apparently rely upon the Regional Director's reasoning. However, while the Board affirmed the Regional Director's decision to dismiss the RM petition, it did not affirm his reasoning regarding the petitioned-for unit. The Board found that, assuming the Operating Engineers were demanding recognition, it was doing so for its contracted unit and had disclaimed any interest in a unit of all construction employees. With respect to the Iron Workers, the Board found the petition

covered the unit in which the employer claimed a demand for recognition had been made. However, the Board held that its earlier pre-***Deklewa*** finding in ***Albuquerque Insulation Contractor***, ***Inc.***, 256 NLRB 61 (1981) that a union's request that an employer sign an 8(f) agreement does not support the processing of an RM petition, retained its validity following the decision in ***Deklewa***. Thus, it dismissed the RM petition.

Here, the Employer and Unions historically were parties to the same 8(f) collective bargaining agreement. The Employer is not attempting to combine two historically separate units. It merely argues that the contractual unit has been modified by practice. Its failure to provide sufficient support for that argument does not warrent dismissal of the petition.

One Person Unit

Duane Drzazgowski, the Employer's owner and president, testified regarding the job descriptions of the Employer's employees.[4] Jim Nelson, a 10-year employee, is a laborer and member of Local 1076. At the time the Employer filed the instant petitions, he was the only employee earning laborers' wages and benefits as outlined in the parties' collective bargaining agreement. Scott Felker, who had previously worked as summer help, began working full-time in approximately May 2005. He does the same work as Jim Nelson, pouring footings and walls, and setting forms. Jess Todson, Duane Drzazgowski's uncle, is a carpenter represented by Local 1234 of the Carpenters Union. Todson is currently on medical leave due to a motorcycle accident. Andy Wells was hired in late 2005 and currently is replacing Todson. Wells works in the field setting forms and pouring walls. He works with Jim Nelson. Duane Drzazgowski testified that field employees work as a composite crew, and laborers and carpenters work together and help out each other. The Employer also employs an office manager, driver, and mechanic.

The Board has held that it will not process petitions for a one-person unit because the principles of collective bargaining presuppose that there is more than one eligible person who desires to bargain. ***Stack Electric, Inc.,*** 290 NLRB 575, 577 (1988). However, the Board requires proof that the single employee unit is stable, not a temporary occurrence. ***McDaniel Electric***, 313 NLRB 126, 127 (1993). Here, the record evidence demonstrates that there are at least two employees and maybe more performing unit work. It matters not that Jim Nelson is the only employee earning laborers' wages and fringe benefits under the collective bargaining agreement. The record evidence demonstrates that Jim Nelson and Scott Felker perform laborers' work and responsibilities as set forth in

[4] The parties stipulated, and I find, that Duane Drzazgowski and Eric Drzazgowski, part-owner and field supervisor, are supervisors within the meaning of Section 2(11) of the Act.

the parties' collective bargaining agreement. The possible failure to provide contractual benefits to Felker does not establish that he is not in the bargaining unit.[5] There is no "one-man" unit here.

Conclusion

Based upon the foregoing and the record as a whole, I find the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees performing work, including yard work, within the territorial jurisdiction of Local 1076, Laborers' International Union of North America, Local 334, Laborers' International Union of North America, and Michigan Laborers' District Council historically performed by laborers in the poured concrete wall industry employed by the Employer out of its facility at 40469 West 11 Mile Road, Novi, Michigan; but excluding guards and supervisors as defined in the Act, and all other employees.[6]

Those eligible to vote shall vote as to whether or not they desire to be represented for collective bargaining purposes by Local 334 and Local 1076 of the Laborers International Union of North America, and the Michigan Laborers' District Council. They shall vote as set forth in the attached Direction of Election.[7]

Dated at Detroit, Michigan, this 1st day of September 2006.

"/s/[Raymond Kassab]."

(SEAL) /s/ Raymond Kassab

Raymond Kassab, Acting Regional Director
National Labor Relations Board
Seventh Region
477 Michigan Avenue- Room 300
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[5] Wells, although classified as a carpenter, may also be performing work that falls under the laborers' jurisdiction. I make no finding as to his eligibility to vote. He may vote subject to challenge by any party.

[6] The unit is different than the petitioned-for unit. If the Employer does not wish to proceed to an election, it may, within 14 days from the date of this Decision and Direction of Election, advise the undersigned, in writing, that it wishes to withdraw the petitions.

[7] The parties did not stipulate not to use the construction industry eligibility formula set forth in ***Daniel Construction Co.,*** 133 NLRB 264 (1961), as modified in 167 NLRB 1078 (1967) and ***Steiny & Co.,*** 308 NLRB 1323 (1992). Absent a stipulation not to use the ***Daniel/Steiny*** eligibility formula, the formula applies to all construction industry elections. ***Signet Testing Laboratories,*** 330 NLRB 1 (1999), citing ***Steiny & Co.*** Thus, the ***Daniel/Steiny*** eligibility formula will apply, as noted in the attached Direction of Election.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted under the direction and supervision of this office among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those employees in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible to vote are all employees who have been employed for 30 working days or more within the 12 months preceding the eligibility date or if they have had some employment in those 12 months and have been employed for 45 working days or more within the 24-month period immediately preceding the eligibility date. Ineligible are those employees who had been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such a strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Employees who are otherwise eligible but who are in the military service of the United States may vote if they appear in person at the polls. Ineligible to vote are 1) employees who quit or are discharged for cause after the designated payroll period for eligibility, 2) employees engaged in a strike, who have quit or been rehired or reinstated before the election date, and 3) employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by:

LOCAL 1076, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 334, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA , and MICHIGAN LABORERS' DISTRICT COUNCIL

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. ***Excelsior Underwear, Inc.***, 156 NLRB 1236 (1966); ***NLRB v. Wyman-Gordon Company***, 394 U.S. 759 (1969); ***North Macon Health Care Facility***, 315 NLRB 359 (1994). Accordingly, it is hereby directed that **within 7 days** of the date of this Decision **4** copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed

by the Employer with the undersigned who shall make the list available to all parties to the election. The list must be of sufficient clarity to be clearly legible. The list may be submitted by facsimile or E-mail transmission, in which case only one copy need be submitted. In order to be timely filed, such list must be received in the **DETROIT REGIONAL OFFICE** on or before **September 8, 2006.** No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, Franklin Court, 1099 14th Street N.W., Washington D.C. 20570.** This request must be received by the Board in Washington by**, September 15, 2006**.

POSTING OF ELECTION NOTICES

a. Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.

b. The term "working day" shall mean an entire 24-hour period excluding Saturday, Sundays, and holidays.

c. A party shall be stopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 days prior to the commencement of the election that it has not received copies of the election notice. */

d. Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of Section 102.69(a).

*/ Section 103.20 (c) of the Board's Rules is interpreted as requiring an employer to notify the Regional Office at least 5 full working days prior to 12:01 a.m. of the day of the election that it has not received copies of the election notice.